IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERNATIONAL HOBBY CORP.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
RIVAROSSI S.p.A.	:	**NO. 98-4964**

M E M O R A N D U M

WALDMAN, J. **August 2, 1999**

This is a breach of contract action. Presently before the court is defendant's motion to dismiss. Defendant contends plaintiff has failed to state a claim upon which relief can be granted because its claims are barred by claim preclusion and by the statute of limitations.

The defense of claim preclusion may be raised and adjudicated on a motion to dismiss where the court can take notice of all facts necessary for the decision. See Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992) ("[w]hen all relevant facts are shown by the court's own records, of which the court takes notice, the defense [of res judicata] may be upheld on a Rule 12(b)(6) motion"), cert. denied, 506 U.S. 821 (1992); Connelly Foundation v. School Dist. of Haverford Township, 461 F.2d 495, 496 (3d Cir. 1972) (res judicata may be raised in motion to dismiss prior to answer); County of Lancaster v. Philadelphia Elec. Co., 386 F. Supp. 934, 937 (E.D. Pa. 1975) (res judicata "may be raised and disposed of on a motion to

dismiss"). A court may take judicial notice of the record from a previous court proceeding between the parties. See Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 416 n.3 (3d Cir. 1988), cert. denied, 488 U.S. 967 (1988).

Plaintiff is in the business of designing and selling model trains. Defendant manufactures model trains. The essence of plaintiff's claims is that defendant breached agreements to supply model "corrugated side passenger cars" and "E8-B locomotives." According to plaintiff, the parties entered into an agreement on March 18, 1987 whereby defendant was to supply plaintiff with corrugated side passenger cars. A similar agreement for the provision of E8-B locomotives was finalized on January 8, 1988.

In a prior action commenced in 1996, plaintiff filed a multi-count complaint against defendant and one other entity not a party to the current action. The complaint alleged that defendant had from 1959 to 1990 designated plaintiff as its exclusive distributor in the United States for all its products and that defendant, inter alia, was refusing to sell any of its products to plaintiff. Plaintiff asserted claims for intentional interference with contract, disparagement, refusal to deal and unfair competition. Plaintiff's refusal to deal claim was based upon §§ 762(a), (c) and 765(1) of the Restatement (First) of

Torts.[1] On June 29, 1998, the court granted defendant's summary judgment motion.

Defendant argues that the claims in plaintiff's 1998 complaint are barred by the judgment entered in the 1996 action. On its face, the 1996 complaint did not specifically refer to the corrugated side passenger car agreement or the E8-B locomotive agreement. In its submissions to the court, however, plaintiff made clear that its claim for refusal to deal was based in large part upon defendant's breach of these agreements. Plaintiff asserted in response to defendant's motion for summary judgment

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[1]Section 762 of the Restatement (First) of Torts states:

> One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not (a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or (b) a means of accomplishing an illegal effect on competition, or (c) part of a concerted refusal by a combination of persons of which he is a member.

Restatement (First) of Torts § 762 (1939).

Section 765(1) of the Restatement (First) of Torts states:

> Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances.

Restatement (First) of Torts § 765(1).

that defendant had a contractual duty to supply the corrugated side passenger cars and E-8B locomotives but had refused to do so. Plaintiff stated that defendant's refusal to deal was improper because "Rivarossi cannot refuse to sell product, especially product that it has a contractual obligation to supply, i.e., the E-8B and corrugated side passenger cars"; that "[c]ommencing in 1987" the parties had executed agreements for manufacture and supply of corrugated side passenger cars and E-8B locomotives; and, that defendant's refusal to supply such items was a "breach" of these agreements. Plaintiff sought damages for the refusal to deal which included lost profits for the "corrugated side passenger cars and E-8B locomotive."[2]

In a pretrial submission in the earlier case, plaintiff explicitly stated that its "Claims For Refusal To Sell The E-8B Locomotive And The 1940 Corrugated-Side Passenger Cars" were "Based Upon A Breach" of the 1987 corrugated side car and E8-B locomotive agreements. Plaintiff emphasized that defendant's refusal to supply the side cars and locomotives was "a breach of the terms of the [locomotive and side car] contracts" and that plaintiff was "entitled to damages for this breach." In its pre-trial memorandum for the 1996 action, plaintiff stated that its

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[2] The 1998 complaint refers to "E8-B" locomotives whereas plaintiff previously used the term "E-8B." From the parties' submissions it clearly appears, and plaintiff does not dispute, that the terms are intended to describe the same model train car.

damages included "lost profits from lost sales of corrugated side passenger cars and E-8B units."

It is unresolved whether federal or state preclusion law governs successive diversity suits in federal court. See Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 962 (3d Cir. 1991). Under either federal or Pennsylvania law, however, claim preclusion requires a final judgment on the merits in a prior suit involving the same parties or their privies and the same cause of action. Id.; Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (Pa. 1995). Plaintiff does not dispute and the court can take notice that plaintiff and defendant were parties to the 1996 action and that a final judgment on the merits was entered. See Hubicki v. ACF Indus., Inc., 484 F.2d 519, 524 (3d Cir. 1973).

Plaintiff argues that the claims in the instant complaint are not part of the "same action" as those in the 1996 case. The "same action" requirement, however, refers not only to claims actually litigated but includes all claims arising out of the same transaction or underlying events which could have been litigated in the first proceeding. Lubrizol Corp., 929 F.2d at 964; Balent, 669 A.2d at 313. Where there is an "essential similarity of the underlying events giving rise to the various legal claims," the two actions are generally deemed the same. Lubrizol Corp., 929 F.2d at 964. The key factor is "whether the

wrong for which redress is sought is the same in both actions." Id. Other factors to be considered include "whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same." Id. at 963.

Plaintiff argues that the claims in the two proceedings are distinct because the "the underlying legal theories are dissimilar," "the underlying contracts are dissimilar" and "the witnesses and documents necessary at trial are dissimilar." Plaintiff, however, neglects the important fact that the wrong complained of in the two actions, defendant's refusal to supply model trains, is the same. While the 1996 complaint was broader and included additional claims involving additional contracts, plaintiff's claims were based in part upon defendant's refusal to supply the side cars and locomotives.

That plaintiff relies on different legal theories in its 1998 complaint is not availing. Different claims arising out of the same underlying events are part of the same action even if the substantive theory in each case is different. Id. (difference in theory of recovery is not determinative); Davis v. U.S. Steel Supply, 688 F.2d 166, (3d Cir. 1982) (same cause of action may comprise claims under numerous different legal theories). See also Restatement (Second) of Judgments § 24 cmt. c, illus. 3. (1980) (If a party pursues a tort claim in a first

action, a contract claim involving the same transaction is barred in a second action).

That the side car and locomotive contracts were not specifically mentioned in the 1996 complaint is also not dispositive. See Lubrizol Corp., 929 F.2d at 964 (that facts critical to second claim were not mentioned in first complaint did not prevent preclusion where party had opportunity to litigate those issues). In its pre-trial submissions, plaintiff explicitly stated that its refusal to deal claim was based upon defendant's breach of the corrugated side car and E8-B locomotive agreements and requested lost profits from those breaches.

It also appears that in fact many of the documents and witnesses required to prove the claims in the 1998 complaint would have been necessary in the 1996 action. Clearly each case would require the same documents and witnesses to prove the existence of the 1987 side car and locomotive contracts upon which plaintiff relied in support of its refusal to deal claim and now relies upon for its breach of contract claim. The same evidence would also be required to show damages from the refusal to supply the side cars and locomotives. That plaintiff needed additional documents and witnesses in the broader 1996 action is beside the point. To suggest that a first action does not preclude a second merely because the first is broader and includes more claims that require additional evidentiary support

is simply unsound.

Plaintiff suggests that even if the claims in the 1998 and 1996 complaints involve the "same action," the court expressly limited the preclusive effect of its judgment order. It points to a footnote in a memorandum in which the court stated:

> Plaintiff suggests in its briefs that as a result it is entitled to recover profits it could have realized under the 1987 Agreements and the Mehano arrangement had it continued. Plaintiff, however, has not pled a breach of contract claim predicated upon those agreements or that arrangement. It is conceivable that plaintiff could plead such a claim. The place to do so, however, is in a complaint and not in a brief opposing summary judgment. A plaintiff may not plead four tort claims and then effectively spawn a contract claim with references in a brief to the measure of damages claimed, whether or not it would correspond to that available for breach of an unpled contract.

A limitation on the future preclusive effect of a judgment must be explicit. See King v. Provident Life and Accident Ins. Co., 23 F.3d 926, 929 (5th Cir. 1994). The statement relied upon by plaintiff was not contained in the judgment order and was not a statement limiting the preclusive effect of the judgment. It was merely an explanation that plaintiff could not convert a refusal to deal claim into a breach of contract claim in a brief. The court certainly did not suggest that breach of contract claims based upon the corrugated side car and E8-B locomotive agreements, if properly pled in the

complaint or an amendment thereto, could not have been asserted in the same action.

That the court rejected plaintiff's attempt to assert a breach of contract claim in the 1996 proceeding by way of a brief certainly does not prevent the application of claim preclusion. Indeed, this shows that plaintiff was well aware of such claims, that the underlying facts were integral to the refusal to deal claim and that the claims could have been timely asserted in the first action. That plaintiff failed timely to assert the breach of contract claims in the earlier action does not affect claim preclusion. See Huck v. Dawson, 106 F.3d 45, 50 (3d Cir. 1997) (even denial of motion to amend complaint in first action does not prevent preclusion of claim that could have been pled in original complaint), cert. denied, 520 U.S. 1276 (1997).

Defendant's statute of limitations defense is really a judicial estoppel argument. Plaintiff's breach of contract claims are not facially barred by the statute of limitations. In its complaint in the instant case, plaintiff alleges that defendant breached both agreements as of October 7, 1994. Plaintiff filed suit twenty days before the four year limitations period for an action arising out of a written contract. See 42 Pa. Cons. Stat. § 5525(5). In the 1996 case, plaintiff asserted that defendant "since April of 1994 had refused to sell [plaintiff] any products." Defendant argues that plaintiff

should be estopped from now contradicting that assertion to avoid the bar of the statute of limitations.

Plaintiff responds that there is no indication the court relied upon or was misled by the prior assertion. Application of the doctrine of judicial estoppel does not require reliance by the court on the offending party's assertion. The doctrine applies where a party has made an assertion which is inconsistent with one made earlier in the same or different proceedings, and either or both of the assertions were made in bad faith. See Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996). Plaintiff, however, also plausibly contends that although defendant refused to sell products by April of 1994, plaintiff did not reasonably appreciate that defendant had repudiated the contracts until October of 1994. In any event, the court cannot determine from the present record or in the context of a Rule 12(b)(6) motion that plaintiff made either assertion in bad faith. The dismissal will thus be predicated only upon principles of claim preclusion.

Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of August, 1999, upon consideration of defendant's Motion to Dismiss (Doc. #3) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and the above action is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.